

BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

HILL & DEITRICK
CECIL C. DEITRICK, DBA
(Petitioner)

PRECEDENT
TAX DECISION
No. P-T-330
Case No. T-74-40

Employer Account No.

DEPARTMENT OF BENEFIT PAYMENTS

Referee's Decision No. OAK-T-6318

The petitioner appealed from the referee's decision which denied a petition for review of a denial of a claim for refund. The Board has accepted additional evidence into the record as Appeals Board Exhibit No. 1.

STATEMENT OF FACTS

The petitioner is a manufacturer's representative which has been in business since 1948. It sells various kinds of electrical heaters.

The petitioner had engaged Mr. Russell Burns and Mrs. Helen Millius as salespersons to sell electrical heaters. Mr. Burns had worked for approximately two years and Mrs. Millius had worked for approximately twelve years.

Mr. Burns would call on electrical contractors to sell the various lines of electrical heaters carried by the petitioner. He worked on a commission basis and earned \$1,834.13 in this manner for the entire year of 1972. He earned \$613.52 for the first quarter of 1973. The period for which the assessment was originally made was the entire year of 1972 and the first quarter of 1973.

Mr. Burns is semi-retired. He works when he wants to, and when he is inclined not to work, he does not do so. During the period involved herein, Mr. Burns had worked at other jobs. He worked part time for an oil company and had also worked selling Fuller brushes.

Mrs. Millius contacted architects and builders. Leads were furnished by the petitioner, and whether a sale was made was thereafter entirely up to Mrs. Millius. She would contact the architect and work with him while he drew his plans, trying to fit into those plans the use of the electrical heaters which Mrs. Millius was trying to sell. When it was determined what heaters would go into the proposed plans, a bid for the sale of the heater was submitted to the architect and/or builder. Other companies sometimes also submitted bids. Even if the bid was accepted, sometimes a lapse of a year or more could occur between the date of the bid and its acceptance. Sometimes the bid would be rejected in favor of a bid from another company.

Mrs. Millius also had an electrical service business in which she was assisted by her husband. She did warranty work on the heaters which were sold.

Mrs. Millius worked on a commission basis. She paid her own expenses. She had an office in her home, although for a period of time she had worked occasionally out of the petitioner's office. She was furnished leads, but there was no requirement that she follow up on those leads. She was not required to meet a sales quota nor to report to the petitioner's office, although the office was available for leads and messages from customers. No reports were required to be submitted and there was no supervision over the selling services.

The additional evidence which we received is a letter from the San Francisco Office of the Internal Revenue Service stating that on the basis of the information presented, it was the opinion of that office that the petitioner neither exercised or had the right to exercise sufficient control over the services of Mrs. Millius to establish an employer-employee relationship. Also submitted and accepted was a copy of Revenue Ruling 73-479.

After the Department had been sent copies of the above described additional evidence, it submitted a letter dated January 21, 1975 to the Appeals Board in part as follows:

"The above opinion and Revenue Ruling are addressed to the question of whether a salesperson is an employee under the usual common law rules, in which the primary criterion is whether the principal has the right to direct and control the workman in the performance of his work."

"The department does not dispute the correctness of that conclusion on the basis of the common law."

"However, it is the department's contention that the status of salespersons under the Federal Unemployment Tax Act and the Unemployment Insurance Code is determined by the provisions of Section 3306(i) of the Federal Unemployment Tax Act, as amended by Congress in the Employment Security Amendments of 1970, and Section 621(c)(1)(B) of the Unemployment Insurance Code as amended by the Legislature in Chapter 1107, Stats. 1971."

REASONS FOR DECISION

Prior to 1972, the question as to whether Russell Burns and Helen Millius would have been employees or independent contractors for unemployment insurance purposes, would have been determined solely in accordance with the principles of the common law. Under these principles they clearly would have been the latter. As independent contractors, the remuneration that they received from the petitioner would not have been subject to unemployment insurance taxes.

Effective with the commencement of the calendar year 1972, the California Legislature added section 621 to the Unemployment Insurance Code. This section now provides a statutory definition of the term "employee" for unemployment insurance purposes for the first time. As pertinent to the status of Russell Burns and Helen Millius the new section states that:

"'Employee' means:

* * *

"(b) Any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee.

"(c)(1) Any individual . . . who performs services for remuneration for any employing unit if the contract of service contemplates that substantially all of such services are to be performed personally by such individual. . . ."

* * *

"(B) As a traveling or city salesman. . . engaged upon a full-time basis in the solicitation on behalf of, and the transmission to, his principal (except for sideline sales activities on behalf of some other person) of orders from wholesalers, retailers, contractors, for merchandise for resale or supplies for use in their business operations.

"(2) An individual shall not be included in the term 'employee' under the provisions of this subdivision if such individual has a substantial investment in facilities used in connection with the performance of such services, other than in facilities for transportation, or if the services are in the nature of a single transaction not part of a continuing relationship with the employing unit for whom the services are performed."

It is to be noted that paragraph (b) above continues to include as an "employee" for unemployment insurance purposes any person who is an employee under the usual rules of common law. However, it then goes on in paragraph (c) to extend the meaning of the term "employee" for unemployment insurance purposes to certain additional persons who are admittedly independent contractors under common law principles. The question presented is whether Russell Burns and Helen Millius are properly includable in the group of salesmen to whom code section 621(c) now extends unemployment insurance coverage.

It is quite clear that in enacting code section 621, the California Legislature had certain provisions of the Federal Internal Revenue Code particularly in mind. The year before Congress had enacted Public Law 91-373 which is known as the Employment Security Amendments of 1970. That law broadened the Federal Unemployment Tax Act definition of an "employee" (26 United States Code section 3306(i)) so as to extend federal unemployment tax coverage to exactly the same individuals to whom our Legislature extended coverage under code section 621.

In the case of the Federal Unemployment Tax Act (FUTA), Congress accomplished this extension of coverage by incorporating most of the Federal Insurance Contribution Act (FICA) definition of an "employee" (26 United States Code 3121(d)). In the case of the Unemployment Insurance Code, our Legislature copied the provisions of the FICA definition verbatim into section 621. In either case the link between all of these laws is quite apparent and the legislative and administrative history of the two federal laws is most important to a proper understanding and interpretation of Unemployment Insurance Code section 621 (See Appeals Board Decision No. P-T-329 wherein we set forth that history at considerable length and upon which we rely).

The Director adopted sections 621(b)-1 and 621(c)-1, Title 22, California Administrative Code to implement section 621 of the Unemployment Insurance Code. It should be noted that these provisions are practically verbatim with certain portions of Title 26, Code of Federal Regulations, section 31.3121(d)-1. This again emphasizes the link between the two federal laws and section 621 of the Unemployment Insurance Code.

Turning to the facts of this case and the application of the law to those facts, first, we need not concern ourselves with the question of whether Mr. Burns and Mrs. Millius were employees under the usual common law rules (section 621(b) of the Unemployment Insurance Code) because the Department has agreed that the referee's decision was correct in holding that Burns and Millius were not employees under the usual common law rules.

Secondly, we must decide whether Mr. Burns was an employee under section 621(c)(1)(B) of the Unemployment Insurance Code. The question presented is whether

Mr. Burns was engaged upon a full-time basis as a traveling or city salesman in the solicitation on behalf of, and the transmission to, his principal (except for sideline sales activities on behalf of some other person) of orders from wholesalers, retailers, contractors for merchandise for resale or supplies for use in their business operations.

We are of the opinion that Mr. Burns was not so engaged upon a full-time basis. He worked part time for an oil company while working on behalf of the petitioner. He also worked for Fuller Brush Company. His earnings for the entire year of 1972 from the petitioner were \$1,834.13. All of these factors lead us to conclude that Mr. Burns was not engaged on a full-time basis and so is not within the statutory definition of the term "employee" for unemployment insurance purposes.

Section 621(c)-1(b)(2), Title 22, California Administrative Code provides in part:

" . . . Traveling or city salesman.
(A) This occupational group includes a city or traveling salesman who is engaged upon a full-time basis in the solicitation on behalf of, and the transmission to, his principal (except for sideline sales activities on behalf of some other person or persons) of orders from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments for merchandise for resale or supplies for use in their business operations. An agent-driver or commission-driver is not within this occupational group. City or traveling salesmen who sell to retailers or to the others specified, operate off the premises of their principals, and are generally compensated on a commission basis, are within this occupational group. Such salesmen are generally not controlled as to the details of their services or the means by which they cover their territories, but in the ordinary case they are expected to call on regular customers with a fair degree of regularity."

Mrs. Millius followed leads furnished by the petitioner to architects and/or builders and submitted bids for their purchase of electrical heaters as needed in various construction projects. These bids could be accepted or rejected. If they were accepted, it could be a matter of a year or more before the bid was accepted. Although Mrs. Millius might call back on occasion to old customers, this is not a situation where Mrs. Millius was expected to call on regular customers with a fair degree of regularity and to transmit orders back to her principal. Therefore, we further hold that Mrs. Millius is not an "employee" within the statutory definition of that term.

DECISION

The decision of the referee is reversed. The petition for review of denial of the claim for refund is granted.

Sacramento, California, October 19, 1976

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

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